Pyramid Management Group, Inc. *and* Local 200B, Service Employees International Union, AFL–CIO. Cases 3–CA–16365, 3–CA–16601, and 3–RC–9709

August 25, 1995

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY MEMBERS STEPHENS, COHEN, AND TRUESDALE

On May 6, 1993, Administrative Law Judge Harold Bernard Jr. issued the attached decision. The General Counsel and the Respondent filed exceptions, supporting briefs, and answering briefs. The Respondent filed a reply brief to the General Counsel's answering brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions to the extent consistent with this Decision and Order.

1. The judge found that the Respondent, Pyramid Management Group, Inc., engaged in a number of violations of Section 8(a)(1) during the course of the union organizing campaign that commenced in February and March 1991[2] at the Carousel Center, a shopping mall facility that the Respondent operates and manages in Syracuse, New York.[3] Except as discussed here, we agree with all of the judge's 8(a)(1) findings, some of which we clarify or further explain below.

a. The Respondent excepts to the judge's finding that it violated Section 8(a)(1) by threatening to reduce or eliminate employees' health insurance benefits. The judge failed to indicate the specific testimony on which he relied to support the finding. Our review of the testimony of employees William Evans and Christopher Johnson fails to convince us that the Respondent's general manager, Ed Marshall, unlawfully told employees that the Respondent would discontinue insurance benefits or that employees would have reduced coverage if the Union became their representative. Accordingly, we reverse the judge's finding and dismiss this allegation of the complaint.

b. During the critical period for the election, Respondent's general manager, Ed Marshall, held a series of meetings to communicate to employees the Respondent's views concerning unionization. He often read from a prepared script and then answered employee questions. At one meeting, the employees were shown a videotape. At other meetings, Marshall used posters and charts, distributed various documents, referred to the Union's constitution and bylaws, reviewed the Union's contracts at other establishments, and generally conducted a ''sophisticated'' campaign.

The General Counsel's witnesses generally admitted that they could not recall verbatim what Marshall had said at the meetings. The judge credited their best memory of Marshall's remarks as the gist of what he said. He discredited Marshall's testimony that employees had misunderstood his gamesmanship. In language not always supported by reference to specific testimony, the judge found that Marshall:

> gave these unsophisticated employees a message whether by inflection, phrasing or ambiguity and they got the message their testimony revealed. The picture which emerges is of an orchestrated cohesive antiunion campaign intended to dramatize company resistance to bargaining which would make union organization futile, lead only to strikes and the employees inability to cross the picket line, [and] would lead to their replacement and loss of jobs . . . .
>
> I find the Respondent by its campaign made manifest to the employees that if the Union was selected a strike was inevitable and that the strikers would be replaced; threatened to reduce or freeze wages; created the impression that it would be futile for the Union to bargain as Respondent would not agree to terms, and would prolong negotiations and would not seriously bargain with the Union if it was voted in; that by mentioning

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 54 (1960), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] All subsequent dates are in 1991 unless otherwise indicated.

[3] The General Counsel excepts to the judge's finding that the Respondent violated Sec. 8(a)(1) by telling employees that if the Union was voted in they could no longer come directly to management with their grievances and would have to get their grievances resolved through a lengthy procedure. The General Counsel points out that his posthearing brief to the judge abandoned this allegation and that the judge's finding of a violation is inconsistent with Board precedent in *Tri-Cast, Inc.*, 274 NLRB 377 (1985); *Midland National Life Insurance Co.*, 263 NLRB 127 (1982). We find merit to the General Counsel's position, and will dismiss this allegation.

We find merit to the Respondent's exception that employee James Thornton's time and attendance record (G.C. Exh. 73), was not properly authenticated and that it was speculative for the judge to conclude that the notation on this record relates to discipline that Thornton claims to have received from Supervisor Anthony Pecchio. Thus, we do not rely on this exhibit to establish March 13 as the date that Marshall met with employees to solicit grievances regarding, inter alia, Supervisor Anthony Pecchio.

We do rely, however, on the credited testimony of employees James Thornton and Michael Scheel that the Respondent's management told employees within a day or two of the meeting with Marshall that the Respondent had terminated Pecchio. The record clearly reflects that Pecchio was terminated on March 15, 1991. Accordingly, we agree with the judge that Marshall did solicit and resolve employee grievances about March 13 by, inter alia, terminating Pecchio on March 15 in order to dissuade employees from engaging in union activity. We find that this unlawful conduct is also objectionable conduct within the critical period commencing after the Union filed its March 11 representation petition.

> the union meeting held at Malarkeys, Marshall created the impression that Respondent surveiled its employees union activities; promised it would give the employees a better wage increase than the Union could get for them if they discontinued their union activities; and that a September wage increase would be delayed or frozen depending on whether the employees voted the union in or not.

c. Based on the credited and unequivocal testimony of employees Mike Elderbroom and Lawrence Snell as set forth by the judge, we agree with the judge that the Respondent violated Section 8(a)(1) by threatening employees with the inevitability of a strike and with replacement if they voted for the Union; by creating the impression that it would be futile for employees to select the Union; and by telling employees that it would engage in dilatory tactics and refuse to bargain or negotiate with the Union for an agreement.

In particular, we note that Elderbroom testified that a week before the election, after showing a videotape and displaying a copy of the Union's 1990 LM-2 form that allocated money for strike funds, Marshall told employees that the Union ''had a lot of strikes'' and ''if the Union came in, that he would . . . we'd be out on strike and he would hire temporaries.'' Elderbroom testified that he believed this statement was verbatim. Elderbroom also testified that Marshall told the employees at the same meeting that he ''wouldn't negotiate with the Union.''

Snell corroborated Elderbroom's testimony regarding this meeting by recalling that Marshall said, ''that if the Union came into Carousel Center, eventually a strike would occur.'' Snell testified that Marshall later told employees in this meeting that, ''the Employer wouldn't cooperate in negotiating a contract with [the] Local.'' On cross-examination, Snell stated that Marshall said, ''That they wouldn't cooperate in negotiating the contract. If it came to that, they would attempt to slow it down, delay it as much as possible.''

d. We also agree with the judge that General Manager Marshall threatened to reduce or freeze wages if the Union came in, threatened to delay a scheduled wage increase if the employees voted the Union in, and promised to give employees a better wage rate than the Union could obtain for them if they discontinued their union activities. These findings are supported by the credited testimony of Snell, Elderbroom, and fellow employee Mustafa Waliyyuddin. We particularly note the following testimony by Snell and Waliyyudin in addition to their testimony paraphrased by the judge. Snell testified that Marshall answered an employee's question concerning when employees could expect their next raise by stating, ''until the issue with the Union one way or the other was settled, all raises would be frozen . . . . It could take weeks, months, indefinite period of time to come to a resolution.''

Similarly, Waliyyuddin testified that about the first week of May, Marshall told about 40 employees during a meeting in the breakroom that:

> If the Union gets in that there would be a delay in us getting any raises, that's what it would do to us . . . . He stated that when the Union [came] in, his hands would be tied . . . . Mr. Marshall stated that benefits—if the Union got in and during negotiations for a contract, that we would lose benefits, we would lose the benefits and would start from scratch . . . . I think [that is] exactly what he said.

Waliyyuddin also testified that at the same meeting Marshall discussed a collective-bargaining agreement between the Union and another Syracuse employer (MONY). According to Waliyyuddin, when discussing this contract Marshall told employees, ''that he could give us a better deal than, you know, more than ten percent without the union.'' The foregoing statements clearly amount to threats of reprisal or promises of benefit in violation of Section 8(a)(1), rather than a lawful expression of views within the meaning of Section 8(c), as the Respondent contends.

e. Finally, in adopting the judge's findings that the Respondent unlawfully created the impression of surveillance, we rely on the credited testimony of Snell and employee Jonathan White. Snell testified that during the same meeting that Marshall threatened to freeze wages because of the Union, he also made the following comment: ''next time you hold a meeting with Dale [union representative] in Malarkey's [restaurant], you can tell him, you know, such and such.'' Snell could not recall the specifics of what Marshall told employees to tell Dale, but stated that Marshall had indicated that he was aware of where the union meetings were being held. Likewise, the credited testimony of employee Jonathan White establishes that in the breakroom in early March, Shift Supervisor Mary Ann Peck told White that Marshall had instructed Peck to find out who was in the Union, but that Peck had expressed reluctance to spy on employees.[4]

Based on Snell's testimony and on White's uncontradicted statement that Supervisor Peck told him that the Respondent wanted Peck to surveil and report back who was for the Union, we find that the Respondent unlawfully created the impression of surveillance, in violation of Section 8(a)(1).

2. We agree with the judge that the Respondent violated Section 8(a)(3) and (1) of the Act by (1) sus-

[4] The judge found that employee Christopher Johnson was present and corroborated White's testimony. Johnson, however, did not directly corroborate White regarding the March conversation. His credited testimony was that he and Peck had a similar conversation in May and that he did not recall anyone else being present at the time. This latter conversation is not alleged to violate the Act.

pending and warning employees Lawrence Snell and Mustafa Waliyyuddin because they assertedly violated the Respondent's unlawfully overbroad rule prohibiting distribution of literature during working hours, and (2) by discharging employees Lonnie Sales and Michael Elderbroom because of their union activities. In adopting the finding as to Sales, we do not rely on the judge's criticism of an alleged policy of ''rigid'' enforcement of the Respondent's no show/no call in rule against good workers. Rather, we rely on the judge's crediting of testimony that Sales had in fact reported to agents of the Respondent that he would be absent because of illness and thus was not guilty of failing to show up or call in for 3 consecutive days, in violation of the rule.

3. The judge concluded that the Union obtained 38 valid authorization cards in a unit of 69 employees, a card majority. The judge also concluded that the Respondent's unfair labor practices warranted setting aside the election lost by the Union on May 31, and that a bargaining order was necessary. We agree with the judge that the Union established a card majority, but we do not agree that a bargaining order is warranted in this case.[5] Accordingly, we shall direct that a second election be conducted.

In recommending a bargaining order here, the judge relied on *Horizon Air Services*, 272 NLRB 243 (1984), enfd. 761 F.2d 22 (lst Cir. 1985), and *Pembrook Management*, 296 NLRB 1226 (1989). We conclude that these cases are inapposite.

In *Horizon*, the employer's president unlawfully interrogated several employees concerning their union activities. He issued threats to two employees that he would ''close the doors if the union came in.'' He unlawfully discharged the principal union adherents, one of whom had been previously reassigned more arduous duty and had been the recipient of a threat that the company would ''clean house when this is over.'' The respondent also actively sought to stymie the union's organizational efforts by implementing new working conditions for all unit employees, granting overtime, changing work hours, and instituting paystubs. There were only 12 employees in the unit, 6 of whom were the direct target of the respondent's highest official's interrogations, threats, and discharges.

In *Pembrook*, the employer's threats and interrogation were directed at more than half of the 16 unit employees. In addition, the employer promised significant benefits to unit employees. It then granted generous bonuses and pay raises as rewards to the majority of the employees after the union lost the election.[6]

By contrast, in the present case, there are no threats of plant closure or mass layoffs, there are no widespread promises of significant benefits, and no benefits have been granted as rewards that have lingering effects on unit employees. In fact, many of Marshall's unlawful statements are accurately characterized by the judge as a mere ''stepping over the line'' during the course of a contested organizing campaign when describing how unionization and collective bargaining might affect the Respondent's workplace. In our view, these 8(a)(1) violations, none of which are ''hallmark'' violations, can be adequately remedied by our customary notice posting and cease-and-desist order. See *St. Agnes Medical Center*, 304 NLRB 146, 147 (1991); *M. A. Industries*, 285 NLRB 1140, 1147 (1987).

The 8(a)(3) violations here consist of two paid suspensions and two discharges of union supporters. Although these ''hallmark'' violations are certainly coercive, they do not always mandate the imposition of a bargaining order as an extraordinary remedy. *Phillips Industries*, 295 NLRB 717 (1989). The suspensions and discharges do not directly affect a significant portion of the 69-employee unit. They are not combined with other hallmark violations that are widespread.[7]

Under extant Board law, the Board does not normally consider management and employee turnover occurring subsequent to the commission of the unlawful conduct. *Highland Plastics*, 256 NLRB 146, 147 (1981).[8] Applying that precedent here and evaluating the situation as of the time the unfair labor practices were committed, we find, for the reasons set forth above, that a bargaining order is not warranted in his case.

Moreover, we note that the Second Circuit (in which this case arises), contrary to the Board, would consider employee and management turnover to be relevant fac-

[5] We decline to join our colleague's position that a card majority was not established. Our colleague does not count the cards of employees Graham, Gosier, and Cowlin. The judge sets forth the testimony of employee Snell that Snell saw the three employees sign their cards in his presence. The judge then counted these cards. It thus appears that the judge implicitly credited Snell's testimony. Concededly, Snell subsequently testified that, on reflection, he may not have seen the cards signed in his presence. Rather, he testified, he gave cards to the three employees and they later returned the cards to him, signed and dated. There is no testimony to the contrary. Assuming arguendo that Snell's first version is incorrect, i.e., that the second version is correct, the cards are nonetheless valid. *McEwen Mfg. Co.*, 172 NLRB 990, 992 (1968); see also *Windsor Industries*, 265 NLRB 1009, 1021 fns. 69 and 70 (1982) (cards are properly authenticated by the testimony of the solicitor that the completed cards were returned to him by the signatories). Indeed, the judge himself recognized this principle. See his citation to McEwen and related text. In these circumstances, we would count the three cards. Thus, even if the other cards, challenged by our colleague, do not count, the Union possessed a card majority.

[6] Member Stephens dissented from the decision to grant a bargaining order in *Pembrook*. As here, he would have ordered a second election.

[7] In *Gissel* itself, the Court stated that in fashioning a remedy in the exercise of our discretion, the Board may properly take into consideration the extensiveness of an employer's unfair labor practices in terms of the likelihood of their occurrence in the future. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614 (1969).

[8] Member Cohen does not pass on the validity of that Board law.

tors. With respect to employees, the record reflects a 61-percent turnover between the time of the events here and the time of the hearing. With respect to management turnover, the record reflects that as of the time of the hearing, Marshall no longer worked at the Carousel Center,[9] and Tuzzolino, Kuhn, and Peck, are no longer employed by Pyramid. Thus, none of the Respondent's management hierarchy responsible for the unlawful conduct here will likely be present for a second election.

In light of the foregoing considerations, we conclude that our traditional remedies, including our customary notice posting and cease-and-desist order could create an atmosphere in which a free and fair second election could be held. Accordingly, we find that a *Gissel* bargaining order is not required in this case and we direct that a second election be held once the unfair labor practices found herein have been remedied.[10]

[9] Marshall's testimony indicates that he remains director of operations for Pyramid.

[10] Member Truesdale agrees with his colleagues that a bargaining order is not warranted in this case solely on the grounds that the General Counsel has not established that the Union represented a majority of unit employees as of March 8, 1991, the date alleged in the complaint. Thus, the judge found that 38 of 69 unit employees had selected the Union as their representative as of March 8 based on authorization cards submitted by the General Counsel. The record however reveals that the card signed by employee Hetherington and counted without explanation by the judge was in fact signed by that employee on March 23, 1991. The General Counsel concedes that the card cannot be counted toward the Union's alleged majority under these circumstances. Similarly, employee Graham's card also is dated March 9, 1991, and thus also postdates the Union's demand for recognition and the majority date alleged in the complaint. Member Truesdale also notes that there is no clear testimony authenticating Graham's card or the cards submitted for employees Cowlin and Gosier. In this regard, the judge cites testimony by employee Snell that the three employees signed the cards in his presence and returned them to him but fails to acknowledge that Snell recanted this testimony after being confronted with his affidavit indicating that he had not witnessed the signatures but had instead received the cards from the employees a few days later already signed. In the absence of any findings by the judge crediting Snell's revised testimony concerning the circumstances in which the cards were executed, Member Truesdale would find that they were not sufficiently authenticated under these circumstances.

Member Truesdale agrees with his colleagues that either version of events to which Snell testified, *if credited*, would be sufficient to authenticate these cards. Member Truesdale however would not adopt the judge's implicit crediting of Snell's testimony that the cards were signed in his presence, because that testimony was subsequently recanted by Snell. Nor would Member Truesdale find that Snell's subsequent testimony on cross-examination that the cards were returned to him signed by the three employees is credible, given that the judge did not credit and indeed did not mention the testimony, but instead credited an inconsistent version of events.

Accordingly, Member Truesdale would find that the General Counsel has shown that the Union represented at most 34 of 69 unit employees as of March 8, 1991, one less than the number required to establish majority status, and he would delete the judge's recommended bargaining order on that basis. Member Truesdale thus finds it unnecessary to address his colleagues' finding that the unfair labor practices found in this case are not sufficiently serious to warrant a bargaining order, or any intimation that a bargaining order should be withheld due to employee or managerial turnover.

ORDER

The National Labor Relations Board orders that the Respondent, Pyramid Management Group, Inc., Syracuse, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees concerning their union sentiments.

(b) Threatening that if the employees choose the Union as their bargaining representative a strike will be inevitable and that they will be replaced.

(c) Threatening to freeze employees' wages or benefits in order to dissuade them from engaging in union activities.

(d) Threatening that a scheduled wage increase will be delayed depending on what occurs with the Union.

(e) Creating the impression that it is futile for the Union to bargain as the Respondent will not agree to terms and will prolong negotiations.

(f) Threatening to refuse to bargain with the Union if it is voted in.

(g) Creating the impression that employees' union activities are being kept under surveillance.

(h) Telling employees that top management has told its supervisors to find out which employees support the Union.

(i) Soliciting employee complaints and grievances and promising to resolve them and to improve terms and conditions of employment in order to dissuade employees from engaging in union activities.

(j) Soliciting employee grievances and resolving a grievance by terminating Supervisor Anthony Pecchio in order to dissuade employees from engaging in union activities.

(k) Promising employees a wage increase greater than 10 cents an hour in order to dissuade them from engaging in union activities.

(l) Telling employees that union activities will get them in trouble.

(m) Telling employees that there will be one less union vote because the Respondent has terminated an employee.

(n) Threatening to terminate other employees who favor the Union so that they would not be able to vote for the Union.

(o) Promulgating and enforcing an overbroad rule or policy which prohibits employees from engaging in union activity during working hours.

(p) Suspending and warning employees and maintaining such warnings because they violated the unlawful rule mentioned above.

(q) Terminating employees because they engage in union activity.

(r) In any other manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Lonnie Sales and Michael Elderbroom immediate and full reinstatement to their jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, and make them whole for any loss of earnings and any other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(b) Remove from its files any reference to the discharges of Lonnie Sales and Michael Elderbroom, the September 9 warnings to Elderbroom, and the warnings and suspensions of Lawrence Snell and Mustafa Waliyyuddin, and notify them in writing that this has been done and that the warnings and suspensions and discharges will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Syracuse, New York, copies of the attached notice marked ''Appendix.''[11] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by Respondent's authorized representative shall be posted by Respondent's authorized representative for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election held on May 31, 1991, in Case 3–RC–9709 is set aside and that the case is remanded to the Regional Director for Region 3 for the purpose of conducting a new election.

[Direction of Second Election omitted from publication.]

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate our employees concerning their union sentiments.

WE WILL NOT threaten that if our employees chose the Union as their bargaining representative a strike will be inevitable and that they will be replaced.

WE WILL NOT threaten to freeze employees' wages and benefits in order to dissuade them from engaging in union activities.

WE WILL NOT threaten that scheduled wage increases will be delayed depending on what occurs with the Union.

WE WILL NOT create the impression that it will be futile for the Union to bargain with the Company since we will not agree to terms and will prolong negotiations.

WE WILL NOT threaten that we will not bargain with the Union if it is voted in.

WE WILL NOT create the impression that our employees' union activities are being kept under surveillance.

WE WILL NOT tell our employees that top management has told supervisors to find out which employees support the Union.

WE WILL NOT solicit our employees' complaints and grievances and promise to resolve them and to improve terms and conditions of employment in order to dissuade employees from engaging in union activities.

WE WILL NOT solicit our employees' grievances and resolve them by terminating a supervisor in order to dissuade employees from engaging in union activities.

WE WILL NOT promise employees a wage increase greater than 10 cents an hour in order to dissuade employees from engaging in union activities.

WE WILL NOT tell our employees that union activities would get them in trouble.

WE WILL NOT tell our employees that there will be one less union vote because we have terminated an employee.

WE WILL NOT threaten to terminate other employees who favor the Union so that they will not be able to vote for the Union.

WE WILL NOT promulgate and enforce an overbroad rule or policy which prohibits employees from engaging in union activity during working hours.

WE WILL NOT suspend and warn employees and maintain such warnings because they broke the unlawful rule mentioned above.

WE WILL NOT terminate employees because they engage in union activity.

WE WILL NOT in any other manner restrain or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Lonnie Sales and Michael Elderbroom immediate and full reinstatement to their jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, and make them whole for any loss of earnings and any other benefits suffered as a result of the discrimination against them.

WE WILL remove from our files any reference to the discharges of Lonnie Sales and Michael Elderbroom and to the warnings and suspensions of Lawrence Snell and Mustafa Waliyyuddin and the September 9 warnings to Elderbroom and notify them in writing that this has been done and that the discharges and the warnings and suspensions will not be used against them in any way.

PYRAMID MANAGEMENT GROUP, INC.

Ron Scott, Esq., for the General Counsel.
Richard N. Chapman, Esq. and *David W. Lippitt, Esq*., of Rochester, New York, for the Respondent.
Christopher Binaxas, of Syracuse, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

HAROLD BERNARD JR., Administrative Law Judge. This consolidated case was tried in Syracuse, New York, on June 9, 10, 11, 16, and 17, 1992,[1] based on a charge in Case 3–CA–16365 dated June 7, and the charge in Case 3–CA–16601 of September 23, amended on November 4, all filed by Local 200B, Service Employees International Union, AFL–CIO (the Union, Charging Party, or the SEIU) against Pyramid Management Group Inc. (Respondent or the Company), which operates the Carousel Mall in Syracuse, New York. An original complaint issued on August 1, was amended on September 30 and an amended consolidated complaint and notice of hearing for both unfair labor practice cases and Case 3–RC–9709 issued on November 7, and a second amended consolidated complaint and notice of hearing issued on March 31, 1992.

Following an organizing campaign that took place mainly between February 15 and March 8, the Union filed a petition on March 11 and sent a demand for recognition and bargaining to Respondent on the same day, which Respondent rejected on March 20.

Following a hearing conducted on April 8, in which the scope of the unit was contested, the Region issued a Decision and Direction of Election on April 24 finding the following was a unit appropriate for the purpose of collective bargaining:

> All full-time and regular part-time housekeeping department employees, maintenance department employees and carousel department maintenance mechanics employed at Respondent's facility; excluding the housekeeping department supervisor, all other employees, carousel operators, customer service department employees, guards and supervisors as defined in the Act.

Respondent appealed the Decision and Direction of Election to the Board and the appeal was denied. On May 31 the election took place and a tally of ballots showed that of approximately 59 eligible voters, 20 cast their votes for the Union and 33 against, with 2 challenges and 1 void ballot. Thereafter the Union filed timely objections to the election and the Regional Director issued his report on October 2 finding that certain allegations overlapped the unfair labor practice complaint and should go to a hearing and he denied certain other allegations. Thereafter the representation case was consolidated with the unfair labor practice cases.

The two principal issues in this case are did top management engage in unlawful threats and promises in its antiunion campaign and discriminatorily discipline and terminate known union members and, second, was this antiunion campaign so pervasive as to frustrate the unionization of employees to the extent that a rerun election could not be counted on to truly represent employee sentiments.

Briefs from the General Counsel and Respondent have been received and considered. Based on the evidence in this case including the credibility resolutions made, I find that the answer to the questions posed above is yes, that the Respondent violated the Act and did so in such a manner as to render a rerun election a poor guide for the sentiments of the employees involved, and accordingly I will find violations of Section 8(a)(1) and (3) and recommend that the Employer be ordered to recognize and bargain with the Union.

On the entire record including my observation of the demeanor of the witnesses and after considering the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

The company is a New York corporation engaged in the operation and management of shopping malls throughout the northeastern United States including the Carousel Center, the facility involved here, in Syracuse, New York. During the preceding year Respondent derived gross revenues in excess

[1] All dates here occurred in 1991 unless otherwise indicated.

of $500,000 and purchased and received at its Syracuse location goods valued in excess of $50,000 which originated directly from points outside New York State. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *Background*

The Carousel Shopping Center is a large shopping mall enclosing l.4 million square feet of space sited on 75 acres. It has three retail levels, one level for movie theaters, a management level, and two skydeck, community, or banquet areas. All maintenance is performed by Respondent with outside housekeeping employees who cut and maintain lawns and remove litter from the parking areas and inside housekeeping which maintains the interior of the mall. As a total it has between 190 and 200 employees, but in the unit found appropriate, the parties agreed there were 69 employees spread throughout 3 shifts. At the trial the parties added 2 names to the list of employees to bring the total to 69.

B. *The Union Campaign and Authorizations Cards*

The union campaign began with some meetings after some exploratory investigation by Union Agent Lawrence Dale. Cards were passed out at meetings and some employees signed and returned the cards then. Other cards were passed out by employees who either saw cards signed and received them back or passed out cards to employees who later returned signed cards to them.

Sixteen persons employed at the time of the campaign testified that they signed their authorization cards and identified them and such cards were received into evidence. These people were:

Sherry Lewis	James Thornton
Jonathan White	Shawn Hamilton
Michael Scheel	William Evans
Alponso Whittington	Paul Green
Anthony River	Michael Elderbroom
Howard Walker	Lawrence Snell
Charzell Poole	Lonnie Sales
Howard Isham	Mustafa Waliyyuddin

Union Agent Lawrence Dale testified that he saw employees Hetherington and Charles McCullough sign union authorization cards and such were returned to him. He also testified that he received signed union authorization cards that were given to him with the signatures of Henry Mitchell, Norman Shephard, Paul Green, and John Thomas Jr. and that he called Paul Green and John Thomas Jr. concerning their cards and told them he appreciated their signing authorizations for the Union. Paul Green, who later testified and identified his own authorization card, is included in the first group above.

As to the authorization cards of Henry Mitchell and John Thomas Jr., there was no testimony offered in regard to them but samples of their handwriting were supplied by the Company and after reviewing them I determined that the signatures appeared to be genuine and received them in evidence. Shephard's card is treated below.

Employee Jonathan White in addition to identifying his own card testified that he gave cards to Laura Cottrell, Lori Murray, and Christopher Johnson; saw each of them sign the card and they returned the cards to him and he eventually got them to Lawrence Dale.

James Thornton testified that he gave an authorization card to James Parker who signed it in his presence and returned it to him, and the card was later given to Dale.

Michael Elderbroom said that he gave an authorization card to Peter LeoGrande who signed the card in his presence and returned it to him and it was thereafter given to Dale.

Lawrence Snell testified he gave authorization cards to David Graham, Donald Gosier, and Paul Cowlin and that each of them signed the authorization cards in his presence and returned them to him and he thereafter gave them to Dale.

Lonnie Sales gave authorization cards to Tim Torrence, Urban Anderson, Ronnie McKinney, and Lloyd McMullen and each of these individuals signed an authorization card in his presence returned them to him and thereafter they were given to Dale.

Mustafa Waliyyuddin testified that he gave authorization cards to James McCullough, Joyce Willis, and Ernest Cueto and they each signed the authorization cards in his presence and returned them to him and that they were thereafter returned to the Union.

William Evans testified that he gave an authorization card to Neal Hopps and that sometime thereafter Hopps returned the card to him signed.

Lawrence Snell testified that he gave a union authorization card to Jeffrey Littleton and later Littleton returned it signed to him and he gave it to Dale.

Waliyyuddin testified that he gave a union authorization card to Kenneth Hill and received it back from Kenneth Hill signed and thereafter it was returned to the Union.

I received all the above cards in evidence and find that each is legitimate and an expression of that employee's desire to have the Union as a bargaining agent. As to the cards which were signed out of the presence of the witness they are legitimate. See *McEwen Mfg.*, 172 NLRB 990 at 995.

As noted above, Dale testified that he received a card with a purported signature of Norman Shephard and thought it was Norman Shephard's signature. Originally, this card was rejected but I thereafter reconsidered and held my ruling in abeyance. No other evidence was produced and no ruling was made on the receipt of this card prior to the close of the testimony. I find there is insufficient identification of this card to count it as a validly signed authorization card.

Thus there is a total of 38 union authorization cards which have been received in evidence and which I have found are valid. This makes for a clear majority in a unit of 69 employees.

To recap: 16 cards were identified by the individuals who signed them, 17 authorization cards were identified by individuals who saw the cards being signed; 3 of the cards were handed back to the solicitor signed by the individuals whose name appears thereon and the remaining 2 cards contained valid signatures from my examination.

C. *The 8(a)(1) Violations*

1. The Pecchio matter

James Thornton, a unit employee, worked at the mall from September 1990 until his termination in January 1992. Around the second week of March he asked Supervisor Tony Pecchio if he was drunk. Thereafter he was given a written warning by Supervisor Michael Tuzzolino. The warning upset him and he tried to get an appointment with General Manager Edward Marshall and could not do so. He bumped into Marshall in the mall 2 or 3 days later and told him he had problems with Pecchio writing up people and coming into work after drinking. Marshall invited him to come to the office and a short while later he did so. He told Marshall Pecchio was writing up people and not treating them with respect. Marshall said he wanted to get everybody in Pecchio's department together and find out about the complaints and what was going on in the mall, and asked Thornton to go get the people together for a meeting. Thornton did so and there were between 10 and 15 from the night crew who gathered in Marshall's conference room. During this meeting some of the employees told Marshall the problems they had been having with Pecchio. Littleton told Marshall the reason that the Union was getting in was because Pecchio was not treating the people with respect. Thornton said this was the same thing he had told Marshall earlier. Others raised problems with pay and with having to come in to get their pay but the principal problem was Pecchio and the way the employees were treated. According to Thornton, Marshall said nothing about Pecchio at the meeting.

A day or so later Thornton's brother-in-law Billy Evans told him the Company had terminated Pecchio. Sometime thereafter he saw Marshall and told Marshall that he had done the Company a favor.

Employee Michael Scheel testified he attended that meeting and said the people were complaining about Night Supervisor Pecchio, that he was hard to get along with and although they were not there to get him fired they wanted Marshall to talk to him. Scheel corroborated that Littleton at that meeting said Pecchio was the reason why the Union was trying to get in. According to Scheel, Pecchio was terminated that night and Supervisor Michael Tuzzolino told the employees that Pecchio was no longer with the Company but did not give any reason for his leaving.

Scheel also testified that during this meeting Marshall told the group to come in on Friday at 7 a.m. and see him if they had problems and they would discuss them and he would try to resolve them. It was either at this meeting or another meeting early in March, according to Scheel, that Marshall said there was no need for a third party, that they could come in and see him like an open door policy.

Edward Marshall is the director of operations for Respondent, and from December 15, 1990, until September 1, 1991, was the general manager of Carousel Center. The mall had been open for 2 months and it was his responsibility to stablize the organization and he was checking all phases of the operation. He said he focused on Pecchio's housekeeping operation since that was one of the largest operating expenses.

Pecchio reported to Operations Manager Ulrich Kuhn. Marshall said he found there was no inventory accountability policy or procedure and no reconciliations being made and that no basis had been established for ordering supplies. He said he asked Pecchio to turn this problem around and use a ''proactive approach to anticipating usage.'' Marshall said they needed an inventory procedure in action; that supplies would run out and sometimes they were understaffed with employees not reporting to work and Pecchio was not following up. He testified that he personally terminated Pecchio after talking about his deficiencies in an exit interview and that the employees were later notified that Pecchio left.

Marshall acknowledged that Thornton complained to him about Pecchio and that he had Thornton get the third-shift employees together so that they could attempt to identify the problems. He testified that there was no discussion of Pecchio at that meeting because he would not allow it without Pecchio being present.

During direct testimony Marshall placed the time of this meeting as between early and mid-February.

During cross-examination Marshall was asked if the item that started Thornton's discussion with him was a March 13 writeup brought on by Thornton's comments to Pecchio. The time and attendance record in evidence shows that Thornton received a verbal warning on March 13 from Pecchio but nothing prior to that time. Marshall said he did not know if that was the thing that started it.

Thornton was a good witness in describing events although he was not very good on dates. His testimony is corroborated by Scheel and further by Respondent's time and attendance report. Marshall on the other hand appeared to testify to what was convenient in order to avoid violations of the Act by attempting to change the time of the meeting from after the advent of the Union to just before it, even though Respondent's own document disproved his assertion. I do not credit Marshall's testimony in his attempt here to deny violations of the Act.

I find that Respondent through Marshall did solicit and resolve employee grievances by terminating Supervisor Anthony Pecchio in order to dissuade employees' union activity and thereby violated Section 8(a)(1) of the Act.

Scheel testified that at that meeting Marshall told the group to come to see him on Friday at 7 a.m. if they had any problems to discuss and he would try to resolve them. Thornton corroborated Scheel's testimony that following the first meeting they had other weekly meetings at which they attempted to resolve problems.

The complaint alleges that Respondent through Marshall solicited employee complaints and grievances and promised to resolve them to improve terms and conditions of employment in order to dissuade employees' union activities.

Marshall testified that he had meetings with the employees on a special program termed ''Lunch with the boss'' and stated that this was a regular program, that no special meetings were ever set up solely to resolve problems. He said this program brought in different groups of employees throughout the complex for a meeting with him so that they could get to know one another better and they discussed various things.

Marshall's explanation skirts the testimony provided above which concerned only the meeting of a shift of employees who came in to discuss problems. Clearly these were two separate types of meetings and Marshall sought to mislead by his testimony which I find not credible. That the Company would resolve employees' problems was dramatically clear to them by the immediate discharge of Pecchio.

I conclude and find Respondent violated Section 8(a)(1) of the Act by soliciting employee complaints and grievances and promising to resolve them or improve their terms and conditions of employment in order to attempt to dissuade employees' union activities.

2. The 8(a)(1) violations by Michael Tuzzolino

Lonnie Sales solicited various employees to join the Union and was doing so in early March in the team leader room or breakroom which is just outside Tuzzolino's office. He was talking to other employees about the Union when Tuzzolino came out of the office put his arm on Sales' shoulder and asked what did he need with that ''shit'' and said it would get him in trouble. Sales responded that he was already in trouble and those around laughed. Tuzzolino shook his head and walked away.

Tuzzolino, who later terminated Sales, testified that when he made the decision to terminate him he was not aware whether Sales participated in any union activities. He was asked whether he had any discussion with Sales about union activities, or make a statement that union activities would get him in trouble. Tuzzolino replied no to both questions. He stated that he was told how to act with employees regarding union matters and was told not to threaten or to initiate conversations. Tuzzolino was not employed by Respondent at the time he testified.

I credit Sales' version of the conversation and find that Tuzzolino asked why he needed the Union and warned that it would get him in trouble and that Tuzzolino knew Sales was engaging in union activities. All of Sales' testimony seemed to hang together and did not appear to be fabricated. I do not know whether Tuzzolino was trying to make points with the Company since he was not employed by it at the time, or that he did not want to admit that he violated prescribed rules of conduct. Sales' Testimony has the ring of truth while Tuzzolino's did not and appeared to be pro forma.

I conclude and find that Respondent violated Section 8(a)(1) of the Act by Tuzzolino's interrogation of and warning to Sales.

3. Marshall's meetings

a. *The employees' testimony*

Marshall testified that he held a series of 6 meetings with unit employees, usually combining the first and second shifts and holding a separate meeting for the third shift, so that it took 12 meetings to cover all the employees. Ordinarily a videotape would be shown concerning union strikes, various benefits, etc., followed by Marshall's remarks and/or questions from the employees and answers by Marshall. On some occasions Kuhn attended the meetings. Marshall used various techniques during these meetings including posters and charts, distributed various documents, referred to union contracts at other establishments, and ran a rather sophisticated campaign that continued to just before the election.

General Counsel's witnesses Elderbroom, Snell, and Waliyyuddin testified concerning these meetings. They admitted that in most instances they could not testify word for word as to what Marshall said but gave their best memory of his remarks and the gist of what he said.

Elderbroom testified that in one of the meetings, which he placed in May, following the showing of a ''movie'' in the breakroom Marshall talked to the employees about union benefits and strike funds. He had a paper showing what was spent by the Union on strikes and said the Union had a lot of strikes and if the Union came in to the mall the employees would be out on strike and he would hire others to come in to work. Elderbroom said that at one meeting Marshall said he would not negotiate with the Union.

Lawrence Snell testified that on the Tuesday before the election he was at a meeting where a videotape was shown and following it there was a question-and-answer session. Marshall said that if a union came into the mall eventually a strike would occur and as a result of an economic strike he would hire new people. Marshall claimed the Union had a reputation of being ''strike happy.''

Either at this or another meeting Marshall, according to Snell, told the employees that if the Union represented the employees and grievances were filed, they would not be handled at the supervisory level but would have to go through a steward and it would be time consuming with a lot of delays involved. Marshall also said that Respondent would not cooperate in negotiating a contract, but would slow down the process and delay it.

At a meeting in May the subject of raises was brought up and Marshall was asked when the employees could expect a raise. Snell testified Marshall told them that until the union issue was settled all raises would be frozen and that could take weeks or months. During a luncheon meeting Marshall said with a union, grievances could take a very long time to resolve, having to go through a court system and said it might take up to 4 years to resolve a grievance.

Mustafa Waliyyuddin testified that at one of the meetings Marshall talked about a contract the Union had with MONY saying the Union had gotten a 10-percent (probably 10 cents) increase there and that he would give them a better deal than that without having the Union. Either then or at another meeting Marshall said that if the Union got in there would be a delay in getting any raises and that is what the Union would do for them. Marshall said that if a union came in, his hands would be tied in regard to benefits and when negotiations started, they would lose benefits and start from scratch.

At a meeting held about 10 days before the election Marshall said those who attended the union meeting at Marlarkeys learned that Respondent lost its position about having customer service employees included in the unit.

During cross-examination Waliyyuddin reaffirmed his testimony that Marshall said that what they had was better than the MONY contract and the amount the Union got at MONY was less than he would give them. Waliyyuddin said that Marshall, in speaking of benefits said that in negotiations the Union would have to start from scratch and they could lose the benefits they had. He concluded that Marshall might not have used the word scratch but what Marshall said meant that. He did not remember Marshall saying that they might get more or get less in negotiations.

b. *Marshall's denials and credibility resolutions*

Marshall drew a distinct line between the meetings held concerning the Union and the meetings with the boss, which he claimed were basically the same as the first meeting con-

cerning Pecchio. His testimony in that regard was discredited based on those who attended the meeting and when it was held.

Marshall said the meetings he held with the employees concerning the Union all took place in May, with six different presentations all made to each of the three shifts. As to grievances he was asked if the employees could talk to him about issues and he told them he did not see anything to prevent them from talking to him but was not sure if anything could be resolved without union participation since he understood the Union had to be involved. He used a poster at the meeting where he talked about grievance handling and answered a question by reading from the poster, which said there could be no meetings without a union representative present. Marshall said that he did not tell employees they could not talk to him if a union came in, nor say it would take 4 years to resolve a grievance if the Union came in. He stated the 4 years concerned the Union's convention and if an employee had a grievance against the Union and sought to appeal it they might have to wait 4 years for the union convention in order to take the grievance to the members at the convention.

Marshall denied saying the Employer would not negotiate. He said he made comments in regard to a poster which said you might get more, you might get less, and you might get the same since the employer and the union have to negotiate. That did not mean the Company had to agree with the Union, or that the Union had to agree with the Company but both were to negotiate in good faith.

Marshall denied saying he would not cooperate with the Union or that the employees would lose their benefits and have to start from scratch with the Union, singling out the word scratch. As to strikes he said the Company distributed a strike calculator which showed amounts employees would lose in wages depending on how long they were on strike and it showed how long it would take to recoup the amount and denied saying there would be a strike if the Union was selected. He said he answered questions of what would happen if there was a strike, by saying he had a business to operate and if employees went on strike he would have to have people come in and clean the mall.

Benefits was the subject of an article mailed to employees and one meeting was devoted to union benefits and contracts. He had the MONY contract and the Central New York Joint Contractors contract and showed employees the benefit provisions telling them the contract required a contribution by the union employees for health insurance, whereas the Company covered 100 percent except for $100 deductible on health benefits. He denied saying the employees would lose health insurance if the Union was selected, and disputed Waliyyuddin's testimony saying that the salary increase was 10 cents not 10 percent.

In regard to wage raises he said he was asked several times about the anniversary wage raises and said he would not comment about raises because he would not want what he said to be construed as a promise. He told employees he could not make promises to them while ''this thing was going on'' and did not say the Company would give them greater than 10 cents per hour wage increases. He denied saying that if the Union got in benefits would be reduced or that the amounts of wages would be frozen. Marshall said that the employees perhaps misinterpreted the comment he made about the MONY contract that if wages were higher than the union contract wages would stop at that level. He said he told employees he had copies of the contracts and they could review them.

In a number of these denials the questions asked of Marshall were couched on a different basis than that to which the General Counsel's witnesses testified. A large part of these denials elicited did not track the earlier violation testimony. Marshall gave his version of what he said and sought to explain that the employees had misunderstood him. Marshall's testimony gave the impression that he felt himself too clever to violate the law and clever enough to walk the brink while delivering his message.

Marshall sought to show that he stayed within the letter of the law in campaigning against the Union. The fact is that he gave these unsophisticated employees a message whether by inflection, phrasing, or ambiguity and they got the message their testimony revealed. The picture which emerges is of an orchestrated cohesive antiunion campaign intended to dramatize company resistance to bargaining which would make union organization futile, lead only to strikes and the employees' inability to cross the picket line, and would lead to their replacement and loss of jobs.

In assessing credibility as between the General Counsel's witnesses Elderbroom, Snell, and Waliyyuddin and Marshall as to whether Marshall made the statements to which these witnesses testified, I am aware that Marshall basically had a script of what to say and that the statements which he admits are close to the borderline of violation, but there is no assurance that he stayed with the script particularly when he was answering questions. The General Counsel's witnesses named above while not professing to remember statements word for word impressed me with their earnestness in searching their memories and trying to recall what was said, and testifying to the best of their memories.

As noted, I discredited Marshall's testimony as to when the Pecchio meeting took place and what was said there. Company documents and the reason for the meeting establish it did not take place when Marshall said it did. His testimony was a transparent attempt to remove it from Pecchio's discharge and avoid a violation finding. By such a maneuver he showed he was willing to shade or give false testimony even contrary to company documents to avoid being found to have violated the Act.

In the instances of these antiunion meetings I find that this conduct continued and he couched his testimony to explain away statements that violated the Act, by asserting that the employees misunderstood him.

I find that Respondent by its campaign made manifest to the employees that if the Union was selected a strike was inevitable and that the strikers would be replaced; threatened to reduce or freeze wages; created the impression that it would be futile for the Union to bargain as Respondent would not agree to terms, and would prolong negotiations and would not seriously bargain with the Union if it was voted in; that by mentioning the union meeting held at Malarkeys, Marshall created the impression that Respondent surveiled its employees' union activities; promised it would give the employees a better wage increase than the Union could get for them if they discontinued their union activities; and that a September wage increase would be delayed or fro-

zen depending on whether the employees voted the Union in or not.

I find that these threats and promises were made for Respondent by Marshall and violated Section 8(a)(1) of the Act.

4. The suspensions of Snell and Waliyyuddin

Lonnie Snell testified that he attended the union meeting on April 4 and Larry Dade gave him some literature to distribute at work the next day, cautioning him to do it before or after work or during his break.

He punched in at 7 a.m and worked to around 10 a.m. when he left to go on break. On his way to the office he distributed five of the pieces of literature by putting them under the gates at various stores since they were addressed to mall merchants. At the office he got his paycheck and then went down to the food court for a cup of coffee before returning to work. In the afternoon he was paged to come to the office where Ulrich Kuhn and Waliyyuddin were waiting.

Waliyyuddin testified he punched in around 6:30 a.m. and followed his regular work schedule going to the three trash compactor areas which took 30 to 60 minutes. Around 7:30 a.m he dropped some of the union literature through the gates at about five stores and was approached by two mall security guards. They asked what he was doing and he said he was handing out some things. One of the guards used a radio and contacted Ulrich Kuhn who came to the scene and asked Waliyyuddin what he was doing. He told Kuhn he was passing out some union material. Kuhn asked if he was aware he was not supposed to do that and he said no. Kuhn told him to go to work and finish his compacting duties. Later he was told to report to the office.

Kuhn said that Marshall wanted to see them in the conference room and Assistant General Manager Charles Breidenbach was also present.

Both Waliyyuddin and Snell were each given a written warning which had checked the printed statement of violation of mall policy. Written in was distributing and soliciting material for others in the mall during working hours. They were given a chance to write something on the form and Snell wrote that he did the ''above violation'' while on his morning break at approximately 10:05 a.m. and not while at work. Written underneath was that each was suspended without pay until April 9, 1991, for an investigation and decision concerning further corrective action. Each signed the form and left.

The two were out of work for 3 days and were bought back to work with no loss of pay and received a memorandum signed by Marshall entitled ''Results of Investigation Written Warning.'' The two documents are substantially the same except for language dealing with Snell's assertion that he gave out the documents while on his break. Following is the text of the memorandum to Snell:

> I have completed my investigation into your actions on Friday, April 5, 1991 which resulted in your suspension from work until April 9, 1991. Distributing and soliciting material for others during working hours is a violation of both Mall and Company policies, as we discussed on Friday, April 5, 1991. During our discussion you admitted to performing the above noted acts but claimed you did so during your paid break period. Observations by others indicated the break was taken afterwards. Regardless, distributing and solicitation in the building is strictly prohibited and remains a serious violation.
>
> This memorandum will serve as a written warning to you that further infractions of the solicitation policy and or neglecting your work duties by performing personal business on company time could result in further disciplinary action.
>
> You may return to work as scheduled on Tuesday, April 9, 1991 and will be reimbursed for any scheduled time lost during the investigation.

Ulrich Kuhn testified for Respondent that it was his understanding of mall policy that no one was allowed to hand out pamphlets or material on mall property and anyone who wanted to do so could seek permission from mall management. According to Kuhn he saw Waliyyuddin sticking pamphlets through tenants' gates around 7:30 a.m. and stopped and questioned him as to whether he was punched in and if he knew he could not hand out material. He said Waliyyuddin answered that he had punched in but was not aware of the policy. Kuhn said he told him to go back to work and he thereafter notified security. He said he also observed Lonnie Snell passing out material on the lower level to several stores and a shopkeeper gave him an envelope of material and he notified security to investigate. Shortly thereafter he saw Snell go in to a restaurant in the food court and then to the breakroom.

During cross-examination Kuhn said although he had not read the policy lately, nothing in it applied specifically to employees and he did not recall if the security guards were there when he told Waliyyuddin to go to work.

Marshall testified that Snell and Waliyyuddin were seen passing literature under tenants' gates and that he spoke to them about distributing materials in the common area of the mall while they were on the clock and suspended them pending further investigation. In his interviews with other management staff he determined that the two were observed distributing such material not on their own time. He called them in and informed them that the warnings they had received would stay in their records and they could return to work and would not lose any pay. He identified Respondent's Exhibit 8 as the company policy and said it was not applied to employees who were passing out material to other employees, but it was applied here to control the environment of shop owners and consumers. He stated that shop owners were permitted to put out handouts if they coordinated them with mall management or distributed on their own premises and stated that nonprofit organizations were permitted to handout materials after having an application to the mall management approved.

From the testimony it would appear that Snell was leaving his work area to pick up his check and take a break when he placed the material under the gates of five stores. It is not clear whether Waliyyuddin was going to take a break or not although he claims he was.

But, as the warning quoted above states it did not matter whether the individual was on breaktime or not, that distributing and solicitation in the mall was strictly prohibited and was a serious violation. The warnings informed them that their actions involved serious matters and any other infrac-

tion of company policy could result in more disciplinary action. They were also told these warnings were to be kept in their personnel files as background for future infractions of company policy.

The complaint alleges that these April 8 written warnings violate the Act by establishing a rule prohibiting distribution and solicitation at Respondent's facility regardless of whether employees are on break and this was done to discourage their organizing activities and violated Section 8(a)(1) of the Act.

The Company seeks to make a distinction between breaktime and employee time stating that this occurred on employees' working time, but as noted above the warning made no such distinction in saying they violated the policy.

The fact is that the rule stated here speaks of working hours and it does not take into account that during working hours employees have breaktime. The rule is overbroad as promulgated and is violative of the Act.

The General Counsel argues that invalid rules such as this may not be applied to any employee and that the act of doing so is also invalid and therefore violates the Act and any disciplinary measures taken are invalid. The General Counsel seeks to have the rule rescinded and to have the disciplinary warnings placed in Waliyyuddin's and Snell's files removed along with the suspension notices.

In its brief Respondent states that neither Snell nor Waliyyuddin obtained a permit to distribute the literature they passed out, which indicates Respondent, at least in the brief, is treating them as outsiders and not as employees.

Respondent tries to draw a distinction between the solicitation of fellow employees and what it believes was a threat to the tenants and sees the union pamphlet as something different from ordinary soliciting of fellow employees on their own or breaktime. Respondent's warning to Snell and Waliyyuddin however did not make any such distinction but spoke of all soliciting. Respondent's argument appears to be an ''ex post facto'' distinction with no support from the factual situation. The memorandum is clear that it forbids all solicitation on working time. This makes the rule bad and any disciplinary action which resulted from enforcing it is also bad and for that reason I find the Respondent violated Section 8(a)(1) of the Act in issuing this rule and by issuing the disciplinary notices and retaining them in its files and hereafter order that such be purged and removed from the employees' personnel files, given no effect, and the rule rescinded.

5. The termination of Lonnie Sales

As noted previously, Sales was active in the Union, secured a number of authorization cards from employees, and testified that he spoke to employees in the breakroom about the Union and was nicknamed the preacher. I previously found that Supervisor Mike Tuzzolino interrogated and threatened Sales and knew of his union activity. Sales worked on the third shift reporting at 11 p.m. and working until 7:30 a.m. the following day. He was on a rotating shift usually with 2 consecutive days off. Sales worked the evening of April 17 through the morning of April 18 and then became sick with the flu. He called the security guard between 8 and 9 p.m. and asked the guard to call Tuzzolino and tell him he would not be in.

On Friday, April 19, Sales went to the mall office to pick up his paycheck as he did every Friday and testified he spoke to Marshall at the office or near the elevator and again in the food court where he went to get something to eat. He explained to Marshall that he had the flu and would not be able to work and asked Marshall to reach Tuzzolino. Marshall had him paged but Tuzzolino did not respond. He then asked Marshall to tell Tuzzolino that he was sick and would not be in that evening for work. He said he had a small child with him and discussed football with Marshall and told him the child's uncle played for Buffalo.

Sales was scheduled to work Saturday evening, April 20, but still felt ill and said he called the security office between 2 and 4 p.m. and talked to a man there and left a message for Tuzzolino that he would not be in because he was still sick.

Sales was next scheduled to work on Tuesday evening and went in and found his timecard was not in the rack. He asked others about his card and the team leader told him he had been fired. He tried to reach Tuzzolino and had him paged but there was no response. One or two days later he returned to the mall and asked Tuzzolino why he was fired. Tuzzolino said he could not talk about it, it was in Marshall's hands and he had nothing to do with it. Sales spoke to Marshall and set up a meeting for the following week, reminding Marshall that Marshall had earlier said that the supervisors could not terminate an employee without Marshall's knowledge or approval.

At the meeting he asked why he was fired and Marshall said he had numerous no-calls and no-shows. Sales denied that he had not called in and Marshall told him to go with Tuzzolino to the security office to see whether there was anything to show he had called in. At the security office a guard showed them a yellow tablet but there was no record of a call from him.

When asked why he had not stayed to see Tuzzolino on the Friday he was in talking to Marshall, Sales said he trusted Marshall who had previously told employees he would do anything to help them and felt Marshall would tell Tuzzolino as he said he would.

Tuzzolino testified that the Company had a rule that if a person did not call in or show up for 3 consecutive days when he was due to be at work, the person would be terminated for violating the no-show no-call rule. Tuzzolino said when an employee violated that rule he would write a notice of termination since he considered such as abandonment by the employee of his position. Employees were supposed to call the security office at times when the mall office was closed and at least a half hour before they were due to report in for their shift and have security advise the supervisor that the person would not be in. Tuzzolino stated that he had not received any messages that Sales had called in for the evenings of April 18, 19, and 20 and when he did not show, he decided immediately to terminate him and did so by writing out a notice of termination and pulling his timecard. He maintained that when he made the decision he was not aware that Sales had participated in any union activities.

Sales called Tuzzolino the following day and asked for an explanation and Tuzzolino said he had been off for 3 days and had been terminated since he had not called in. Sales said he had called in. Tuzzolino admitted he had heard complaints about security not relaying call-ins to supervisors, but said before he terminated Sales he checked the logbook for any entries and Sales' time and attendance card. He changed

his testimony when he remembered that the logbook had not been initiated at that time and said security kept a record which he checked every evening when he went to work. Tuzzolino said that Sales did not demonstrate to his satisfaction that he had called in on any of the 3 days.

Marshall testified that Tuzzolino had authority to discharge and he had no knowledge that Sales was engaged in any union activity. He denied having a conversation with Sales in the food court prior to his termination or that Sales said he would be absent or that he requested Marshall to tell his supervisor that he would be absent. He further said that he reviewed the record when Sales did come in and believes the termination was warranted.

The picture presented here is of an employee who tells a very convincing detailed story why he was not at work on three nights and how he attempted to relay the reason for his nonappearance to his supervisor. Adding to Sales' testimony is the fact that he was not deserting his job but was attempting to keep it and tried repeatedly to convince the Company he had called in and wanted his job. Against Sales are Marshall's and Tuzzolino's denying that they knew he was engaged in union activity and stating that he violated the rule and the discharge was warranted.

In this situation I credit Sales, noting I have previously credited Sales when his testimony conflicted with Tuzzolino in regard to the 8(a)(1) violations. Clearly, Tuzzolino knew of Sales' union activities. Nor do I credit Marshall's denial that he knew of Sales' union proclivities. Tuzzolino knew of the activities and such is imputable to Marshall. Marshall was aware of union activities and Sales' activities were not hidden. The fact (hereafter found) that Marshall asked his supervisors to find out who was in favor of the Union shows Marshall sought such information.

Tuzzolino said he considered that an employee abandoned his job if he was off three consecutive nights without calling in. The idea of abandonment is not one compatible with the actions of Sales who was trying at all costs to keep his job. I credit Sales' testimony that he talked to Marshall on Friday, April 19, when he went to the office for his paycheck and did mention to him that he was sick with the flu and asked for the message to be passed to Tuzzolino when Tuzzolino did not answer his page. It is clear from the testimony of Sales and Tuzzolino that there were problems with the security guards either not recording messages or not passing them along.

Sales was a convincing witness who supplied details and seemed very earnest in his testimony. His version of the events hangs together and is plausible.

Respondent's story is one of rigid adherence to a rule with the assumption of no call-in, despite flawed message taking, in the face of a person trying to keep a job. Tuzzolino maintained that somehow Sales had to convince him he had called in but in this situation what possible proof could Sales offer other than his testimony, and Respondent's position is based on the discredited claim that Tuzzolino had no knowledge of Sales' union activity.

There appears to be no reason for Respondent's rigidity in firing Sales, particularly with his being a good worker, which Tuzzolino admitted and his good prior record other than Sales' open active partisanship for the Union, particularly when viewed against the background of Respondent's antiunion activity.

I find that Respondent terminated Lonnie Sales because of his union activities in violation of Section 8(a)(1) and (3) of the Act.

6. Shift Supervisor Mary Ann Peck's statement

Employee Jonathan White testified that Shift Supervisor Mary Ann Peck said that at a supervisor's meeting the supervisors had been told by Marshall to find out and report who was in the Union. Employee Christopher Johnson was present and corroborated this statement. Respondent did not call Peck to testify.

The uncontradicted statement is credited and I find that Respondent by Supervisor Peck told employees that Respondent wanted her to surveil and report which of the employees were for the Union, and that Respondent thereby violated Section 8(a)(1) of the Act.

7. The termination of Michael Elderbroom

Elderbroom began work for Respondent in September 1990 in exterior housekeeping, meaning he cleaned up the parking lot and mall entrances, mowed lawns, mulched plants, shoveled snow, etc. His immediate supervisor was Tom Goebel who was supervised by Mike Tuzzolino.

Elderbroom signed a union authorization card, displayed union bumper stickers on the car he drove to work, and wore union buttons to work for about 2 weeks before he was fired. In April he and union organizer Dale went to employee Andjeski's house to talk about the Union. It was in June, following the union election, that Andjeski was made group leader and the shift employees were told that Andjeski was their group leader and that they were to follow his instructions.

Elderbroom testified to some of the 8(a)(1) violations found above.

Following the May 31 election the Union filed objections on June 7 and while those objections were being investigated the charges in this case were filed. The subject matter of the objections overlapped the unfair labor practice charge and the investigations were carried on simultaneously.

The Region issued the complaint on August 1 in which some of the matters alleged as objections were alleged as violations of the Act. Thereafter the amended complaint issued on September 30 and the order consolidating the objections with the complaint issued on October 2.

It is obvious that if any of the preelection act violations were proven, then, at the least, the election would be set aside and a rerun election would be ordered.

On September 10 Elderbroom was summoned to Tuzzolino's office. Tuzzolino said he had complaints about him, pointed to three warning slips which Elderbroom read and said he was going to let him go. After reading the warnings all prepared by Andjeski, Elderbroom said they were lies. One of the warnings said that he had not cleaned the sanitary tanks and he told Tuzzolino he had done so and had gone on to other work. A second warning said his job performance was below standards, that he was absent for a period of 70 minutes stalling on the job to get other employees to do his work. Elderbroom disputed this saying he was present and working and there were no other employees to do the work. The third warning said he was loitering during working hours and after punching in did not report for work for 45 minutes. Elderbroom told Tuzzolino they are allowed

15 minutes to get supplies and get to work and said he was at work within 10 minutes of punching in. Tuzzolino said there was nothing he could do about it, that he had to let him go. Elderbroom said Andjeski had not discussed any of the matters in these warnings with him. He had received a warning for using company equipment to start a customer's car and another for not having cleaned a mall entrance sufficiently, but both were on April 23.

Tuzzolino testified that he was ordered by Kuhn to terminate Elderbroom for poor performance. He said Andjeski wrote the warnings on September 9 and based on them he wrote the termination papers and called Elderbroom in on the September 10 and told him he was being terminated for poor work performance and an excessive amount of warnings. During cross-examination he said he did not investigate the matter since Kuhn had ordered him to perform the termination.

Andjeski testified he was made a team leader in June and was given the authority to write up employees for disciplinary problems. He said he complained to Kuhn in June that Elderbroom was not performing and asked Kuhn to talk to him. Kuhn told Andjeski that he had the authority to discipline employees by writing up oral reprimands or giving written reprimands. Andjeski said he talked to Elderbroom about his performance throughout the summer and tried to get him to improve.

Kuhn testified that Andjeski complained about Elderbroom and he told him to write Elderbroom up if he had any problems, and added that Andjeski complained that the other employees did not pay attention to his directions. Kuhn had a meeting of the employees and told them Andjeski was in charge of the outside crew and they were to follow his directions.

In late August Andjeski said he was told his job was slipping because he was letting his men get away with too much and they were taking advantage of him and he had better shape up. He said he talked to Elderbroom and told him as of September 1 he was going to start writing disciplinary notices if his duties were not correctly done. Andjeski said he checked on Elderbroom and he had not cleaned the sanitary tanks as instructed although Elderbroom said he had done so. He checked on him another time and found him outside with a lawn mower saying he was cutting grass. Andjeski said he did not think Elderbroom had been working because he did not think the grass was short enough. On another occasion he went looking for Elderbroom, could not find him, punched his timecard out and when he finally found him punched it back in. He said this took about half an hour. It was these three events he wrote up on September 9.

Within a day or so of Elderbroom's termination Christopher Johnson was near the trash compactor and was talking to Andjeski. Andjeski in commenting about Elderbroom being fired said it would be one less union vote with Mike gone and he would take care of others.

During cross-examination after reaffirming Andjeski's statement, Johnson was asked why the bottom of his affidavit was missing and replied that he had ripped off the part containing his signature because he was afraid of losing his job if his name became known.

There is no question that Andjeski knew of Elderbroom's union activities since he had been the object of them at one point and knew that such were continuing in this period when it was known there was a possibility of a new election. Andjeski said he was criticized for not keeping the men shaped up and apparently went on a campaign and focused on Elderbroom. Whether Elderbroom was the problem Andjeski makes him out to be is doubtful or at best problematical since they are at direct odds as to what work Elderbroom performed and when.

When asked whether he had discussed union activities as a cause for Elderbroom's discharge Andjeski said no, but said he did talk to Waliyyuddin about a second election stating contrary to Waliyyuddin that the Union could not win. He did not directly contradict Johnson's testimony but an inferential attempt was made.

I credit Christopher Johnson's version of what took place since I do not find Andjeski to be a reliable witness. He appeared to be very biased against Elderbroom and sought to paint him in the most negative terms. I credit Johnson because he appeared to be an honest witness trying to remember what occurred and one who was scared of being associated with the Union by his testimony.

Andjeski's motive in writing up Elderbroom was to produce a number of disciplinary warnings to give Respondent a reason to terminate a prounion adherent when it was facing the possibility of a second election. Andjeski's written warnings were taken at face value and Elderbroom was not given a chance to counter them. There was no investigation but only an order from Kuhn to Tuzzolino to terminate Elderbroom. Andjeski disclosed the true reason for the discharge in his statement to Johnson and the accompanying threat that he would get others as well.

I find that Respondent violated Section 8(a)(1) and (3) of the Act by its termination of Elderbroom and violated Section 8(a)(1) by Andjeski's statement and threat to Christopher Johnson.

8. The representation case and *Gissel* remedy

With the findings of 8(a)(1) and (3) violations before the May 31 election, I find that the election was conducted in an atmosphere that precluded a fair election and the results of that election must be set aside.

The question remains whether a rerun election could validly demonstrate the sentiments of the unit employees. I find in all the circumstances here that it could not. Relying on *Horizon Air Services*, 272 NLRB 243 (1984), and *Pembrook Management*, 296 NLRB 1226 (1989), I find that under the *Gissel* standards and the standards enumerated by these two cases a bargaining order must issue here. *Pembrook*, supra at 1227, notes that the Board will issue a bargaining order in circumstances where the union has obtained valid authorization cards from a majority of the unit employees and is entitled to represent the employees for collective-bargaining purposes and the employer's refusal to bargain with the union is not motivated by a good-faith doubt, but by a desire to gain time to dissipate the Union's majority status as evidenced by the commission of substantial unfair labor practices during its antiunion campaign.

I have found substantial unfair labor practices were committed by top management at the mall. Respondent waged a sophisticated campaign directed at unsophisticated employees to create a picture of management obduracy and resistance to the Union and to negotiating a contract to the extent that if the Union should win an election the employees' organiza-

tional drive would be rendered futile. This message was driven home as is demonstrated by the 8(a)(1) violations and was punctuated further by the warnings to and suspensions of two union adherents and the termination of another prior to the election.

When it became clear with the issuance of the first complaint that there were substantial matters to be litigated concerning violations of the Act which impinged on the objections and if proven would sustain the objections, Respondent struck again at one of the Union's supporters. It terminated Elderbroom in September following uninvestigated allegations by a minor supervisor who knew of Elderbroom's union activities and thereafter told an employee that would be one less union vote and threatened that he would get others.

The violations were major and encompassed a lot of employees in the bargaining unit to the extent that one employee testified on cross-examination by Respondent that he tore his name off the affidavit for fear it would become known and he might be fired. The Company's campaign continued past the election looking toward the possibility of a rerun election with the message being spread by Andjeski that he would get others as well.

Accordingly, in the words of the Board in *Pembrook*, I find that Respondent's unfair labor practices were so pervasive as to render the expression of free choice in a rerun election highly unlikely.

I therefore recommend on the basis of having found that a majority of the employees in the appropriate unit designated the Union as their collective-bargaining agent, that the Board issue a bargaining order finding that Respondent's bargaining obligation commenced with the Union's demand on March 8, 1991.

CONCLUSIONS OF LAW

1. By coercively interrogating employees concerning their union sentiments; by threatening that a strike was inevitable and that strikers would be replaced if the Union was voted in as the employees' bargaining representative; by threatening to reduce or freeze wages and benefits in order to dissuade union activities; by threatening that a September wage increase might be delayed depending on what happened with the Union; by creating the impression that it would be futile for the Union to bargain as Respondent would not agree to terms but would prolong negotiations; by threatening that Respondent would not bargain with the Union if it became the employees' bargaining representative; by creating the impression that Respondent surveiled its employees' union activities; by a supervisor's statement that top management wanted its supervisors to find out which employees supported the Union; by telling employees that if the Union was voted in that they could no longer come directly to management with their grievances but would have to get their grievances resolved through a long delayed procedure that could take up to 4 years, thereby dissuading the employees from becoming union supporters; by soliciting employee complaints and grievances and promising to resolve them; by soliciting grievances and resolving a grievance by terminating Supervisor Anthony Pecchio in order to dissuade employees' support of the Union; by promising employees a wage increase greater than 10 cents per hour; by threatening employees with possible loss of health insurance if they selected the Union as a bargaining representative; by telling an employee that his union activities would get him in trouble; by promulgating and enforcing a rule prohibiting employees from engaging in union activities during working time; by telling employees that there would be one less union vote because Respondent had caused an employee to be terminated; and by threatening to cause other employees to be terminated for that same reason, Respondent violated Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By discriminatorily suspending employees Lawrence R. Scheel and Mustafa Waliyyuddin on April 5 for violation of an unlawful rule and by keeping such rule in existence and keeping such suspensions and warnings in the employees' personnel file, Respondent violated Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

3. By discriminatorily terminating Lonnie Sales on April 21, 1991, and Mike Elderbroom on September 10, 1991, Respondent violated Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

4. I find that the following constitutes an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act at Respondent's location.

> All full-time and regular part-time housekeeping department employees, maintenance department employees and carousel department maintenance mechanics employed at Respondent's facility; excluding the housekeeping department supervisor, all other employees, carousel operators, customer service department employees, guards and supervisors as defined in the Act.

5. I further find that since March 8, 1991, the Union has been the exclusive collective-bargaining representative of all the employees employed in the above appropriate unit for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

REMEDY

Respondent having discriminatorily discharged employees Lonnie Sales and Mike Elderbroom it must offer them reinstatement and make them whole for any loss of earnings and other benefits they suffered, computed on a quarterly basis from the date of their discharges to the date of a proper offer of reinstatement less any net interim earnings as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Respondent must also remove the warning slips from the personnel files of Waliyyuddin and Snell, and the September 9 slips from Elderbroom's personnel file.

Further having found that Respondent engaged in the violations of Section 8(a)(1) found above, I find that it must be ordered to cease and desist therefrom and to take affirmative action designed to effectuate the policies of the Act. In the instant case, I find that to remedy the violations found since Respondent has frustrated the employees' freedom of choice in selecting a union, the remedy must include an order to recognize and bargain with the Union.

[Recommended Order omitted from publication.]